

**BID UNIT, FAIR LABOR DIVISION  
BUSINESS & LABOR BUREAU  
OFFICE OF ATTORNEY GENERAL MARTHA COAKLEY**

**FINAL REPORT OF FINDINGS REGARDING PROCUREMENT OF PUBLIC  
CONSTRUCTION BY THE NANTUCKET MEMORIAL AIRPORT  
COMMISSION**

**I. Introduction:**

Pursuant to M.G.L. c. 149, § 44H, the Bid Unit of the Fair Labor Division in the Attorney General’s Office conducted an investigation of the public construction procurement practices of the Nantucket Airport Commission (“Airport Commission”) to determine if a violation of the public bidding laws had occurred. The purpose of this report is to summarize key problems and practices that were revealed over the course of the investigation.<sup>1,2</sup> The report also includes recommendations for changes and identifies remedial efforts now underway by the Town of Nantucket (“Nantucket”) to improve procurement contracting and procurement practices at the Nantucket Memorial Airport (“Airport”).

**II. Background and Summary of Findings:**

During the relevant time period, the Airport Commission, a public awarding authority for purposes of the public design and construction bidding laws, including M.G.L. c. 7, §§38A1/2-O, c. 149, §§44A-M and c. 30, §39M, was responsible for public construction at the Airport. The Municipal Airport Commissions statute, M.G.L. c. 90, §51E, requires the establishment of a commission of three to eleven members to manage municipal airports. The Airport Commission comprises 5 citizens selected by the Nantucket Board of Selectmen (“BOS”). Such a commission is authorized to appoint an airport manager “... for the proper maintenance and operation of the airport and all

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<sup>1</sup> Unlike the vast majority of investigations handled by the Bid Unit, which result from the filing of Bid Protests with this Office, this matter did not involve a single, pending procurement, but multiple, past procurements by the Airport Commission since 2008.

<sup>2</sup> This Office provided our initial findings to the Town on September 14, 2011.

facilities under his supervision.” Id. At all relevant times, pursuant to M.G.L. c. 90, § 51I, the Airport Commission, was authorized “...to make contracts for the maintenance, operation, construction, enlargement and improvement to the Airport and for the purchase of materials, supplies, and equipment pursuant to the laws of the Commonwealth governing the making of like contracts.” Pursuant to M.G.L. c.41, §56, the Town Accountant for Nantucket is responsible for reviewing warrants for payments to vendors contracting to do business with the Airport Commission and determining whether those payments are valid based, in part, on whether proper procurement procedures were followed in awarding contracts.

Our review of the Airport Commission and Airport Manager’s oversight of the procurement and contracting practices of the airport revealed significant deficiencies concerning compliance with both the Commonwealth’s procurement statutes and sound financial management tools. These deficiencies include, but are not limited to practices bearing the appearance of bid splitting, failure to comply with certain obligations under the prevailing wage law, failure to obtain written contracts for services to be performed, inaccurate references to procurement law exemptions to avoid proper bidding, and a basic failure to understand that proper procurement practices are as applicable to the expenditure of so called enterprise funds as they are to most taxpayer funded contracts. Examples of these practices are summarized below.

**1. Practice of Dividing Projects into Smaller Procurements Created Appearance of Attempting to Evade Public Bidding Requirements**

With great frequency, the Airport Commission approached projects which should have been the subject of a single, comprehensive procurement process and divided them into the subject of smaller, incremental purchases. This pattern is suggestive of intent to avoid compliance with the construction bidding laws, in violation of M.G.L. c.149, Section 44J(7). For example, electrical contractor Robert W. King, Inc. invoiced the Airport for over a total of \$47,000 for various projects over a three year period from January of 2008 to June of 2011. Each invoice was for less than \$5,000-\$10,000. During one period in the early months of 2011, King submitted 19 separate invoices to the Commission for payment totaling approximately \$22,000 for work at the Airport’s fuel

farm. Pursuant to the construction bidding laws, all construction contracts estimated to cost \$10,000 or more must be awarded in compliance with M.G.L. c. 149, §44A-M or c.30, § 39M, depending on the nature of the construction work. Properly aggregated, that scope of work required formal sealed bids and advertising, neither of which is evidenced in the records of the Airport. The determination to issue repeated relatively small invoices to the same contractor, often over relatively short time intervals, has often been cited by this Office as indicative of bid splitting.

Beginning on or about August 2008, the Airport Commission paid Bernard Walsh and his company Multi-Systems for telephone and cabling system services through 25 separate payments, totaling approximately \$250,000. The amounts of the invoices varied from less than \$5,000 to one invoice in June of 2009 in excess of \$40,000. Although some of the individual invoices standing alone would not have triggered formal competitive bidding requirements, when properly aggregated, they would have required formal sealed bids and the use of contractors certified by the Division of Capital Asset Management (“DCAM”) for services since the value of the contract far exceeded the \$100,000 threshold implicating DCAM certification. No such process was followed.

## **2. The Airport Commission Repeatedly Failed to Comply with its Obligations Under the Prevailing Wage Law**

The Airport Commission undertook numerous construction projects without complying with its obligation under the Prevailing Wage Law, M.G.L. c. 149, §§ 26-27 et seq. Under the Prevailing Wage Law, awarding authorities are required to request and incorporate into construction bid specifications prevailing wage rate schedules from the Department of Labor Standards (formerly known as the Division of Occupational Safety) and thereafter, maintain a copy of the certified payroll records contractors must submit to them on a weekly basis. *Id.* During the relevant time period, numerous, smaller construction projects were undertaken without the inclusion of the prevailing wage rate schedules in the bid specifications. Accordingly, contractors performing public works

construction on behalf of the Airport Commission did so without compliance with the prevailing wage laws of the Commonwealth.<sup>3</sup>

Even after this problem had been identified and reported to Nantucket, and communicated to the Airport Commission by Nantucket, correspondence from Airport Commission staff demonstrated a failure to comprehend that all construction work, regardless of the value of the contract, necessitated the issuance of prevailing wage sheets as part of the procurement and contracting practices. Accordingly, it is likely that numerous contracts over the last seven years have been performed by construction workers who, by virtue of the Airport Commission's failure to obtain rate sheets from DLR, were deprived of their rights under the prevailing wage law. Unfortunately, unless an awarding authority requests and DLR issues a rate sheet, the prevailing wage cannot be enforced. See M.G.L. c. 149, §§ 26-27 et seq.

When asked about compliance with procurement requirements on the fuel farm work in 2010 (see Section 7 below), in a memorandum to town counsel, the airport manager commented that "World, North Shore, and Carlyle are all public works contractors so I assumed that prevailing wages were paid." Although it is not incumbent upon the awarding authority to enforce the Prevailing Wage Law, it is required that the awarding authority, pursuant to M.G.L. c.149 §26-27, obtain appropriate prevailing wage rates in soliciting bids for projects and receive records indicating compliance with those requirements. The records provided for this project provide no indication that either requirement was met despite the expenditure of nearly half a million dollars worth of public dollars.

### **3. Contracts Excessively Expanded Beyond Scope of Original Contract Through Indiscriminate Use Of Change Orders**

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<sup>3</sup> An exception to this rule can be seen on capital projects undertaken by the Airport Commission, on which an Owner's Project Manager – not the Airport Commission – oversaw the work in question. On capital projects, almost across the board, a prevailing wage rate sheet was included with the specifications and it appears that the prevailing wage was indeed paid.

The records reviewed demonstrate that the Airport Commission has often compounded the problems associated with no-bid contracts and/or improperly bid contracts by granting repeated change orders that allowed relatively limited scope and/or small value procurements to escalate in complexity and dollar value significantly beyond the scope of services for which vendors were originally hired. For example, a landscaping project at the new terminal building was put out to bid in March of 2009 with no reference to a gazebo being included in the plans. Nonetheless, a gazebo was constructed at a cost of approximately \$170,000. The original price quote for the terminal building project was \$256,070. Thus, the additional \$170,000 paid for the gazebo represented a nearly 40% increase in the total cost of the terminal project. Except under limited circumstances (e.g. unanticipated site conditions), change orders that constitute significant percent increases in the scope of work violate principals of proper procurement because they result in contracts that are fundamentally different than the contracts which were put out to bid. *Morse v. Boston*, 253 Mass. 247 (1925). Here, construction of the gazebo should have been included in the work that was bid out and the failure to do so constituted a violation of the bid laws.

**4. Lack of Written Contracts Undermines Contractor Accountability and Makes It Difficult to Determine Scope and Duration of Contracts**

The Airport Commission's failure to have written contracts for construction performed at its behest undermined the ability to determine, in retrospect, the scope and duration of contracts, and to hold contractors accountable for contract obligations. For example, Champoux Landscape received payments in excess of \$370,000 for construction work and supplies, including the construction of a gazebo at a new terminal facility, over a period of approximately two years. Nevertheless, there was no written contract incorporating plans and specifications for those services. It is unclear whether the construction of the gazebo itself at a cost of approximately \$170,000 was ever intended to be part of the original scope of work for which Champoux was hired. Consequently airport management has described the project as being done in "phases" and yet the lack of defined dates for performance and delineation of scope make it

difficult to determine when each phase began and ended. In another example of this practice, no written contract existed with telephone system contractor Bernard Walsh, despite the fact that he was paid over \$250,000 in a two and half year period commencing in August of 2008. Absent a written contract, it is extremely difficult to ascertain whether the contract was properly performed and whether the Airport Commission derived the benefit for which it expended the \$250,000.

**5. Misunderstanding and/or Indifference Toward Various Procurement Statutes Contributed to Improper Conclusions Regarding Applicable Laws and Exemptions**

Comments contained in various emails and other communications by the Airport Manager demonstrate either ignorance of the proper application of Massachusetts procurement laws or intentional disregard for those laws. At various junctures, since the procurement issues with the Airport came to light, the Airport Manager has attempted to explain away multiple failures to properly bid construction services by referencing a provision in M.G.L. c.30B, a law which is wholly inapplicable to construction procurements. The exemption, known as the “aviation use exemption” contained in c.30B, §1(b)(29), has been narrowly construed by the OIG and is not intended as a broad based exemption from requirements to make most goods and services purchases in compliance with the construction bid laws. The aviation use exemption is explicitly and exclusively applicable to procurements subject to M.G.L. c. 30B. Accordingly, the exemption has no relevance to Airport contracts which were subject to c. 149 and c. 30, §39M. Whether the Airport Manager was aware of the inapplicability of the exemption is unclear. Regardless, a person in the position of making such procurements should have been keenly aware of the distinction and should have sought guidance on the point if he or she was uncertain. At the very least, the Airport Manager proceeded without regard for the proper manner of procurement.

**6. The Fact that the Airport Operated out of an Enterprise Fund Appears to Have Been Misconstrued as a Basis for Reducing Public Transparency and Compliance with Procurement Regulations**

In multiple communications between Airport personnel and Nantucket officials and in public statements by Airport personnel, there appears to be a perception that expenditures made from so-called enterprise funds are somehow exempt from procurement requirements and other forms of accountability as compared with purchases made from revenues in the general fund of a municipality. There is no basis for this concept contained in either the applicable procurement statutes nor in the Commonwealth's municipal finance laws. Nonetheless, the implication that such enterprise revenues are somehow distinct in terms of accountability has been reported by Nantucket as a recurring point of contention with Airport management in recent years.

Even after the concerns regarding procurement compliance had become the subject of public discussion in Nantucket, a member of the Airport Commission chose to make a point in a letter to the local newspaper reporting on the various financial and procurement irregularities at the Airport that "[I] feel the compelling need to clarify that airport revenue does not come from taxpayer money. It comes from the following: general aviation (fuel sales and additives, landing fees, ramp fees and catering income); rental income (terminal, FAA tower, land and hangars); sales, auto rentals and video-conferencing; fees (freight handling, aircraft landing fees, tie-down fees, customer facility charges); vehicle revenue (parking lot, parking tickets and taxi permits)." Even accepting those statements as accurate, it does nothing to change the legal requirements applicable to the Airport in expending those funds.

**7. The Airport Sometimes Used Bartering and Other Informal Relationships as the Basis for Contract Award, Even When Such Practices Were Inconsistent with Procurement Requirements.**

In multiple documents related to this matter, references exist to contractors having obtained work based on some personal connection to the Airport operations. For example, as noted in a memorandum in December of 2009 from the Airport Manager to the Commission, a recipient of a paving contract, Victor Brandon Corp., was referenced as being involved in a "barter deal." Under the arrangement the company's services and materials were exchanged, in part, for the use of property under the control of the Airport. Such arrangements are generally inconsistent with the bidding requirements of the

construction bid laws and raise issues of unequal footing since not all contractors would be able to participate in similar arrangements.

In another instance, the Airport Manager referred in one public comment to a contractor being “[j]our go to guy for phones,” referencing the vendor being local and familiar with the system at the airport. There is also evidence that on repeated occasions, contracts were only executed after work had already been performed. For example, the contract signed by electrical contractor Robert W. King, Inc. (see above) was apparently signed more than a month after the completion of the work.

**8. The Renovation of the Restaurant at the Airport Appears to be the Largest Scale Violation of c.149 and Reflects the Airport’s Disregard for the Procurement Laws and Proper Contracting Practices.**

The Airport’s handling of the renovation of its restaurant in 2007 serves as a microcosm of the abuses of public procurement and sound fiscal and contracting practices identified by this Office and Nantucket. During a single year, one contractor, The Castle Group, was paid in excess of \$1 million as the result of an arrangement between the Castle Group and the airport manager that was entered into without any competitive bidding process. Not only did this constitute a clear violation of c.149, the lack of any detailed specifications, contractual requirements, or project parameters left the Airport vulnerable to having costs, work schedules and performance terms essentially dictated by the vendor.

The breadth of the agreement between the Castle Group’s principal, Christopher Skehel and Airport manager Peterson appears to be contained in a seven sentence letter of January 2, 2007 wherein Skehel informs Peterson he agrees to do “the renovation and the addition of the Hutch’s Restaurant wing of the airport building...[including] all work needed to bring the restaurant up to code...Also included will be the provision of construction of labor and materials for the addition. Any exterior renovation needed will be determined during the course of construction.” Skehel also announced in the letter that all carpentry work would be charged at \$50-60 per hour and that he would charge a



general contractors fee of 15% for subcontractors and materials. Subsequently, Nantucket received and paid six invoices from The Castle Group between March and November which totaled \$1,070, 643.79, including payment for as much \$446,504 in a single month. These payments were made without the benefit of a formally executed contract or any of the many statutorily required contract terms and conditions which apply to construction work on public buildings.

In attempting to explain the lack of bidding procedures, the Airport Manager indicated that after a lease had been awarded to the Nantucket Restaurant Group, it was determined that the facility needed to be brought up into compliance with building and health code requirements in order for the restaurant to be operable. A decision was made to let the tenant's contractor perform the work since it was an "emergency" and they wanted to open the restaurant as soon as possible. Consequently it was agreed to pay for any structural work needed to make the facility code compliant. However, it appears that as additional structural deficiencies were identified, the contract with the Castle Group was repeatedly expanded.

Relevant records indicate that the architectural firm hired to provide specifications for the work in question was hired without adherence to the statutorily required procedures for such hiring. In January of 2007, the Nantucket Architecture Group Ltd., ("NAGL") through its principal William McGuire, issued a letter to manager Peterson indicating it would perform design services for the renovation of the restaurant for a fee not to exceed \$25,000 at a rate of \$150.00 per hour. Attached to the letter was a list of services NAGL would provide and a contract drafted by NAGL and executed by McGuire and Peterson. This approach is inconsistent with the Commonwealth's Designer Selection Law, M.G.L. c.7, §§38A1/2-O, which requires a formal competition where a design fee is expected to exceed \$10,000 and the construction costs are expected to exceed \$100,000. A properly conducted designer selection process would also require an awarding authority to put forth its own contractual terms and conditions, including statutorily mandated provisions such as errors and omission insurance requirements for parties providing design services on public buildings.

**9. The Rehabilitation of the Fuel Farm by the Airport Appears to be the Largest Scale Violation of c.30, 39M and is Also Indicative of Problems with the Airport's Procurement and Contracting Practices.**

In the early months of 2010, the Airport Commission identified problems with the integrity of the four aboveground jet fuel storage tanks at the airport that are part of the “fuel farm.” The work needed to restore the tanks involved addressing rusting through the epoxy liner which reportedly was causing contamination of the fuel and excessive water in the tanks. Ultimately the Airport expended approximately \$477,000 to make the needed repairs at the fuel farm. Such work would customarily be subject to bidding under M.G.L. c. 30, §39M, as a public works construction project. Nonetheless, the Airport proceeded to make direct calls to potential vendors qualified to perform components of the project such as the painting work as well as the steel framework rehabilitation. Additional contracts were awarded through informal solicitation procedures for the piping work in the fire suppression system and for the replacement of electrical wiring.

In explaining the procurement procedures used, the airport manager indicated he “... relied on both the emergency issue and the aviation exclusion to approach the solution.” The need to address deficiencies discovered at the fuel farm in an expeditious manner is understandable in terms of potential safety hazards and property damage. However, awarding authorities who believe they need to invoke emergency procedures to procure construction services are required to seek waiver of public advertising rules through the Division of Capital Asset Management (“DCAM”). That agency makes determination based on the awarding authority’s description of exigent circumstances as to whether a deviation from standard bidding procedures is warranted. When a waiver is granted, often based on a concern about imminent dangers to people and/or property, DCAM will often condition the waiver on the use of some minimum competitive procedures (e.g. soliciting a minimum number of telephone quotations) in lieu of the advertised sealed bids with the requisite waiting period. There is no evidence in the records for the project provided by Nantucket that a waiver was sought from DCAM. The Airport’s manager also refers to his belief that the fuel farm was “aviation related

project” and therefore not subject to standard procurement requirements. This is an invocation of the M.G.L. c.30B, §1(b)(29) exemption for contracts involving “aviation uses or the sale of aviation fuel.” This exemption is not actually relevant to the construction work performed at the fuel farm since that work is subject to c.30, § 39M and not c.30B.

The problem with the lack of written contracts was also in evidence for the various components of the fuel farm repairs.

**10. Nantucket Has Undertaken Significant Steps to Improve the Airport’s Procurement and Contracting. This Office will Continue to Monitor Construction Related Procurement by the Airport Commission For the Purpose of Ensuring Both Compliance with the Public Bidding Laws, as well as the Prevailing Wage Law.**

This Office acknowledges the multiple measures undertaken by Nantucket both before and since this matter came to our attention. This Office recognizes the cooperation received from the Town Manager, CPO, and town counsel in connection with our efforts to review these matters. The Town was fully cooperative and provided ready access to this Office in response to document requests.

Of great importance, upon learning of the issues at the Airport, the Town centralized procurement review and approvals through the Office of the Chief Procurement Officer (“CPO”) of Nantucket. It also heightened scrutiny of Airport expenditures and contracting by the Finance Department of Nantucket in order to monitor compliance with procurement requirements as a prerequisite to paying invoices received from vendors and halted payments on contracts improperly procured. Nantucket acted appropriately and consistent with long-standing legal precedents in the Commonwealth by stopping payments on contracts awarded in contravention of the appropriate procurement statutes. Further, the Town sought and received effective guidance from town counsel regarding proper procurement procedures, which greatly enhanced its efforts to bring a halt to the rampant procurement problems which marked the administration of the Airport under its then-leadership team.

The Memorandum of Understanding entered into by the Board of Selectmen and the Airport Commissioners on September 21, 2011, represents an opportunity to bring much improved control over the procurement practices of an agency which has clearly had systemic resistance to and ignorance of fundamental public procurement contracting practices. In particular, Nantucket's plan to hire an assistant procurement officer who will work out of the Town offices and answer directly to the CPO is a welcomed measure to enhance the Airport's compliance efforts. Despite current budgetary constraints, we urge the Airport Commission and the Town to move forward with this plan as soon as practicable. Even though the employment of the Airport Manager ultimately responsible for many of the problems discussed herein has been discontinued, the documents and correspondence reviewed by this Office strongly suggest that the culture of disregard for procurement regulations has become endemic among administrative personnel at the Airport and therefore the input of independent representatives of the Town remains vital to implementing compliance initiatives.

Finally, the hiring of an outside auditing firm to conduct a comprehensive and independent audit of the contracting and financial operational practices at the Airport was an important step. Although the focus of this Office and this report has been on construction contracting procurement, numerous other concerns have been raised in the course of reviewing materials and receiving input from a variety of sources within Nantucket and the community. As referred to above, these include, but are not limited to, concerns about indiscriminate use of the credit cards and travel budget of the Airport, commercial relationships between businesses employing family members of Airport staff members and the Airport, the need to better inventory equipment purchased for the Airport to assure it is being used there exclusively, and the awarding of financial benefits to employees inconsistent with Nantucket personnel policies. The independent review effectively highlights these and many other issues and provides the Town with a litany of issues to address.

The Town has begun to put into place the start of more efficient checks and balances on procurement undertaken by the Airport and we anticipate that such checks

will greatly enhance compliance efforts. Given that the Airport Manager responsible for the procurement issues addressed above is no longer in the employ of the Airport Commission, we are encouraged that a new culture of compliance will emerge. To that end, we recommend that all staff involved in procurement on the part of the Airport Commission, and the Town, receive and/or continue training in proper procurement practices and continue to seek input from town counsel and this Office, as needed.

To ensure that the public construction procurement compliance at the Airport has been achieved, we will continue to monitor such procurement on a quarterly basis beginning as of September 1, 2012. To that end, we have asked the Town to submit to the Bid Unit within the Attorney General's Fair Labor Division a summary report of all public construction related contracts, including:

a description of the project, the selected contractor, the dollar amount of the project, unsuccessful bidders, a description of the bases for contract award, any unusual issues in the procurement, and any change orders in the contract, and a copy of certified payroll records submitted by the contractors performing construction. The required reports shall be submitted for the period ending September 1, 2012, December 1, 2013, March 1, 2013 and June 1, 2013 and shall cover construction/bidding activity during the preceding 3 months.

The Town has agreed to provide the requested information going forward, and to assist our office in monitoring the Airport Commission's compliance with the public construction procurement laws, as well.

### **III. Conclusion**

Presuming this disclosure and monitoring occurs as requested, and presuming that this office's oversight discloses future compliance with the public construction procurement laws, this report is intended to close the Bid Unit's inquiry into the

Nantucket Memorial Airport. As described in this report, all of the examined practices have now ceased and safeguards have been put in place by the Town to guard against their repetition.